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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1350

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the Order of the district court, which denied the union's motion for summary judgment to enforce the award and order of the National Railroad Adjustment Board, and which denied the railroad's motion for summary judgment to set aside the same award and order, but instead, which remanded the dispute to the NRAB for further arbitration proceedings, constituted a "final decision" under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE*

On August 4, 1961, engine foreman J. W. Stuard was in charge of an assignment which began work at 3:30 p.m. and performed general yard and industry switching in Memphis, Tennessee. Approximately six hours later, Stuard was removed from duty by a trainmaster of the railroad on the ground that Stuard had violated Rule G of the Illinois Central's "Rules and Regulations." Rule G provides:

> "G. The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited."

Article 22 of the applicable collective bargaining agreement between the railroad and the union sets forth the procedure which the railroad is required to follow in discipline cases.

Pursuant to the provisions of Article 22, the railroad sent a letter to the employee notifying him that an investigation had been scheduled for the purpose of determining whether "you used or were under the influence of an intoxicant while on duty as engine foreman at approximately 9:30 p.m., August 4, 1961"; that the employee's "file and previous work record will be reviewed at the investigation"; and that the employee would be permitted "to bring a representative and witnesses in your behalf."

The investigation was conducted on August 9, 1961. The employee was represented at the hearing by a local chairman of the union, and the employee presented two

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* The Petitioner United Transportation Union is referred to herein as the "union" and the Respondent Illinois Central Railroad Company as the "railroad."

witnesses on his behalf. A formal transcript of the proceedings was taken.

The railroad called several witnesses. In each instance, the trainmaster conducting the investigation would read into the record a document, in the form of a letter or report, which the witness had prepared concerning the event under investigation. After the document had been read, the witness was asked to affirm that he had prepared the document and that the statements contained therein were true and correct to the best of his knowledge. The witness thereafter was questioned further by the trainmaster and following such testimony the employee's representative cross-examined the witness.

On August 11, 1961, the trainmaster rendered his decision, finding that Stuard had violated Rule G, and he was dismissed from service.

In accordance with Article 22 of the collective bargaining agreement, the employee appealed the decision of dismissal, first to the appropriate superintendent of the railroad and thereafter to the highest operating officer of the railroad designated to handle such disputes. The employee's claim was denied at both steps of the grievance procedure.

On March 31, 1964, the union filed a claim with the National Railroad Adjustment Board, First Division, (herein referred to as the "NRAB"), pursuant to Section 3, First of the Railway Labor Act (45 U.S.C. sec. 153), requesting that Stuard be reinstated with back pay for all time lost.

The partisan members of the First Division, consisting of five members appointed by the carriers and five members appointed by the unions, could not agree on the

disposition of the claim and, pursuant to Section 3, First (1) of the Act (45 U.S.C. sec. 153, First (1)), a neutral referee was appointed to sit with the Division.

On January 30, 1968, the NRAB issued an award and order sustaining the claim of Stuard for reinstatement and back pay. In rendering its decision, the NRAB concluded "that the evidence used to support the position of the carrier is almost totally hearsay and hence inadmissible." (Petition, A-18.) The railroad refused to comply with the award and order and a suit for enforcement was instituted by the union on April 26, 1968 pursuant to Section 3, First (p) of the Railway Labor Act (45 U.S.C. sec. 153, First (p)). Issue was joined by the railroad on October 9, 1968. Thereafter, on October 23, 1968, the union filed a motion in the district court for partial summary judgment in its favor enforcing the award and order, and on December 26, 1968, the railroad cross-moved for summary judgment requesting that the complaint be dismissed and that the award and order be set aside.

On April 9, 1969, the district court entered a Memorandum and Order denying both motions for summary judgment. The district court found that the NRAB had erred in refusing to consider the evidence of the railroad on the basis that such evidence was inadmissible because it was hearsay. The court remanded the dispute to the NRAB (Petition, A-10):

> "for further consideration on the merits in keeping with the procedures established by the National Railroad Adjustment Board in the First Division—the Board to specifically consider all the evidence presented in its entirety in keeping with the established procedures."

The district court concluded (Petition, A-10):

> "The parties have raised a number of points in support of their various motions for summary judgment, which the Court will not consider at this time, since it is clearly apparent that the matter is to be remanded to the National Railroad Adjustment Board, First Division, for further consideration."

On April 19, 1969, the union filed a motion in the district court to vacate the Order of April 9, 1969, and to sustain the union's motion for partial summary judgment. On July 10, 1969, the district court entered a supplemental Memorandum and Order denying the motion. The court stated (Petition, A-13):

> "Although not previously stated in hard language, the Court now states that the action before the Board amounted to a failure of the Division to comply with the requirements of the Railway Labor Act and for that reason the matter was remanded for further consideration to permit the Board to correct the deficiency noted."

An appeal was taken by the union to the court below, and on October 30, 1970, the court of appeals dismissed the appeal on the ground that it did not have jurisdiction because the remand order of the district court did not constitute a "final decision" under 28 U.S.C. Section 1291.

The court stated (Petition, A-3-4):

> "The Court of Appeals for the Eighth Circuit in *Transportation-Com. Div.* v. *St. Louis-San Francisco Ry. Co.*, 419 F. 2d 933, 935 (8th Cir. 1969), cert. denied October 12, 1970 (No. 155, October Term, 1970), recently faced with the identical question of the finality of a district court remand order to the National Railway [sic] Adjustment Board, stated:

> "'A remand order for further proceedings is not a final decision contemplated by § 1291. . . . The trial court has neither enforced nor denied enforcement of the Board's determination of the merits of the controversy, and it has not dismissed the action.'

"We are in agreement with the result and reasoning of the Eighth Circuit. The very nature of a remand order for 'further consideration' indicates the district court has not entered a final order, but has temporarily sent the dispute back to the Board. The present situation is analogous to the treatment of stay orders by the district court pending arbitration proceedings. Where a district court has been faced with a dispute and has stayed such dispute pending an initial proceding for arbitration of the merits, the courts have held that such a stay was not a final appealable order. *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, 179 (1955); *Alexander* v. *Pacific Maritime Association,* 332 F. 2d 266, 267 (9th Cir. 1964); *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283,* 268 F. 2d 618 (2d Cir. 1959)."

THE WRIT SHOULD NOT BE GRANTED

The union's position in the court below, in its brief and oral agreement, was that in an action to enforce an award and order of the NRAB, a decision of a district court remanding the dispute to the NRAB for further arbitration proceedings is tantamount to a final order setting aside an award and order and thus subject to appellate review. This Court, five months ago, refused to grant a writ in a case raising the same issue involved here. *Transportation-Communication Employees Union* v. *St. Louis-San Francisco Ry.*, 419 F. 2d 933 (8th Cir. 1969), *cert. den.* 91 S. Ct. 34 (1970) (referred to herein as the *"Frisco"* case).

Although continuing to press the same contention, the union now seeks to interject a new argument, apparently by dividing the old one in two parts. In the remaining portion of this Opposition we will demonstrate that no matter how the union slices its argument, it comes down to a proposition that now has been rejected by the courts of appeals for the two circuits that have considered it, that is contrary to prior analogous decisions of this Court and lower courts, and that can find no support in the Railway Labor Act or its legislative history.

1. The union's first point (Petition, at 10-16) is that the court below erred in considering that the union appealed only from the district court's remand order, but instead, that the union also was appealing from the district court's order denying the union's motion for partial summary judgment to enforce the award and order of the NRAB. The union asserts (Petition, at 16):

> "Thus, the question arises whether the decision of the district court denying enforcement of the award which unquestionably is subject to appellate review, was rendered not subject to appellate review by a concur-

> rent decision of the district court remanding the dispute to the NRAB."

The flaw in the union's assertion is that if the remand order of the district court is put aside, all that remains is an interlocutory decision of the district court denying the motions of both sides for final judgment.

The union apparently ignores the fact that the district court not only denied the union's motion for summary judgment to enforce the award and order, it likewise denied the railroad's motion for summary judgment to set aside the same award and order. If not for the remand, the case would have continued before the district court until a final judgment was entered either enforcing or denying enforcement of the award and order. Thus the district court held (Petition, A-10):

> "The parties have raised a number of points in support of their various motions for summary judgment, which the Court will not consider at this time, since it is clearly apparent that the matter is to be remanded to the National Railroad Adjustment Board, First Division, for further consideration.
>
> "It Is, Therefore, the Order of this Court that plaintiff's Motion for Partial Summary Judgment be and the same is hereby denied.
>
> It Is the Further Order of this Court that defendant's Cross-Motion for Summary Judgment be and the same is hereby denied."

The union cites several cases in which decisions of district courts denying enforcement to awards and orders of the NRAB were subject to appellate review. In each of such cases, however, the court entered a *final judgment* holding the award and order to be unenforceable and dismissed the action. There is no question that under such circumstances the final judgments of the district courts

were subject to review. There likewise is no question that the present case, in which the district court *specifically denied* the railroad's motion to set aside the award and order and dismiss the complaint, does not fall into the same category. The rationale of the district court in remanding the dispute to the NRAB was not that the award and order were void and unenforceable*, but rather, that the NRAB had not yet rendered an award and order that complied with the requirements of the Railway Labor Act which could be enforced or set aside.

In essence, the question the union seeks to present to this Court is whether a denial of a motion for summary judgment, which does not at the same time enter a final judgment against the movant, constitutes a "final decision" under 28 U.S.C. Section 1291. The union does not cite a single case or a single compelling reason for this Court to reverse the well-settled principle that such interlocutory orders are not subject to appeal.

2. The second point of the union's petition (at 17-24) asserts that an order of a district court remanding a dispute to the NRAB for further arbitration proceedings is subject to appellate review under decisions of this Court and under Section 3, First (q) of the Railway Labor Act (45 U.S.C. sec. 153, First (q)).

The union states that remand orders to the NRAB are subject to appellate review under decisions of this Court but does not cite a single decision so holding. There is none. The only cases referred to by the union are those holding that a *final judgment* of a district court either enforcing an award and order of the NRAB or denying

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* Indeed, if it had so held, there would have been nothing to remand.

enforcement by dismissing a suit for enforcement are subject to appellate jurisdiction. The court below did not disagree with the holding of these cases. The issue here, however, is whether a remand for further arbitration is the same as a final judgment setting aside an award and order. With respect to this issue, the only decisions directly in point are those of the court below and the Court of Appeals for the Eighth Circuit in the *Frisco* case, *supra*. In both cases, the courts found that remand orders are not "final decisions" under 28 U.S.C. Section 1291 and therefore not subject to appellate jurisdiction.

The union argues that the remand order must be considered a final order because the district court did not retain jurisdiction of the case, but it points to nothing in the record of proceedings before the district court to show that the lower court did not retain jurisdiction. Indeed, in remanding the dispute to the NRAB, the district court expressly left open "a number of points in support of [the parties] various motions for summary judgment, which the Court will not consider *at this time*." (Emphasis added.) Furthermore, because the complaint was not dismissed it would appear that upon the issuance of a proper award and order of the NRAB the union would be allowed to seek enforcement of such award and order in the same action should the railroad fail or refuse to comply. Moreover, even if the district court had released jurisdiction of the action, it would have no bearing on the question of whether its remand order was final. The court below considered the contention, stating (Petition, A-4):

> "The Union contends that the failure of the district court to preserve its jurisdiction pursuant to its remand order and the possibility that review of any subsequent proceedings by the Board could be in-

> stituted in another court, is evidence that the district court's order is final. Regardless of whether the district court has retained jurisdiction, its remand order was not final and
>
> > "'[W]hether or not the subsequent proceedings could be instituted in another court in our view has no material bearing on the crucial issue of whether the orders appealed from are final decisions.'
>
> *"Transportation-Com. Div.* v. *St. Louis-San Francisco Ry. Co.,* 419 F. 2d 933, 936, (8th Cir. 1969)."

The union also argues that the addition of the sentence in subsection (q) that: "The judgment of the Court shall be subject to review as provided in sections 1291 and 1254 of Title 28", was for the purpose of showing that Congress *intended* that remand orders also be subject to appellate review. The union's argument is without merit.

Initially, if the addition of the sentence was designed specifically to establish that remand orders are subject to appeal, surely there would be some statement in the legislative history of the amendments to show such Congressional purpose. The legislative history of the amendments does not even mention the subject of appellate review, let alone the subject of whether remand orders are within Section 1291. The court below came to the same conclusion, stating (Petition, A-5):

> "Neither a reading of Section (q) nor a study of the legislative history shows any indication that its drafters intended that remand orders be subject to appellate review. In the absence of legislative intent, we must rely on the plain meaning of the last sentence of Section (q). . . . We determine it was the intent of Congress to provide for review of district court orders only in the event that these orders are final, and the district court's remand order was not final."

Moreover, in light of the complete absence of any legislative history, if Congress did in fact intend to make remand orders subject to appeal, it selected the least likely way of making its intent manifest. If the union's argument is correct, the last sentence of subsection (q) should have provided that "all" decisions of district courts shall be subject to review "notwithstanding" the provisions of Section 1291. As the sentence now is constructed, the logical conclusion is that, if Congress intended anything by the reference to Section 1291, it intended to make it clear that there was no design to broaden appellate jurisdiction beyond the power conferred under Section 1291. The numerous cases cited by the court below and the *Frisco* decision show that appellate courts do not have jurisdiction to review decisions remanding cases for purposes of arbitration under that Section.

The union asserts that the court below "ignored the practical effect test" of this Court for determining the finality of district court judgments. The answer to this contention is that the court below found it unnecessary to apply general principles to the subject matter when it found numerous decisions, including those of this Court, dealing with the specific subject and analogous subjects, which provided the proper approach.

The union's final argument on this point is that if remand orders are beyond review, district courts might utilize the power of remand to deprive a party of an award with which the court disagrees on the merits. Disagreement with the merits of an award, however, is not one of the statutory grounds empowering courts to remand or set aside decisions of the NRAB. Apparently, the union is arguing that a district court, disagreeing with the merits of an NRAB decision, may fabricate a jurisdictional defect in order to remand the dispute for a recon-

sideration of the merits, and that to prevent such abuse the Act must be construed as allowing appeals from district court remand orders. The railroad believes that this contention does not require comment.

3. The third point of the union (Petition, at 24-28) attacks the holdings relied upon by the court below. In substance, the union dismisses them all by stating that some cases arose under the Labor-Management Relations Act, others under the United States Arbitration Act, while others arose under the Social Security Act. The union's assertions concerning the origin of these cases are entirely correct—and irrelevant. These cases show that their rationale for holding that remand orders for the purpose of arbitration are not appealable was in no way the result of any requirement to such effect under the particular statute, but rather, resulted from a consideration of what constitutes a "final decision" under 28 U.S.C. Section 1291.

The common thread running through all those cases, the same thread connecting those cases to the one here and the *Frisco* case, is simply that a district court remand for purposes of arbitration is not subject to appellate review.

The cases relied upon by the court below all dealt with situations in which decisions of district courts remanding cases for arbitration were appealed to courts of appeals. In such cases, the rulings of the courts have been that where the relief sought of the district court in the action was to order arbitration, the ruling of the court that arbitration was required was an appealable order. On the other hand, when the issue before the court dealt with the merits of the dispute and the district court ruled that the merits first would be subject to an arbitration, the ruling

of the court that arbitration should proceed was *not* an appealable order.

The distinction between the two situations was described by this Court in *Goodall-Sanford, Inc.* v. *United Textile Workers of America,* 353 U.S. 550 (1957). In that case, the Court affirmed the decision of the lower courts ordering enforcement of an agreement to arbitrate. The Court stated (at 551):

> "There remains the question of whether an order directing arbitration is appealable. This case is not comparable to *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176, which held that a stay pending arbitration was not a 'final decision' within the meaning 28 U.S.C. § 1291. Nor do we consider cases like *In Re Pahlberg,* 131 F. 2d 968, and *Schoenamsgruber* v. *Hamburg Line,* 294 U.S. 454, holding that an order directing arbitration under the United States Arbitration Act is not appealable. The right enforced here is one arising under § 301 (a) of the Labor Management Relations Act of 1947. *Arbitration is not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought.* A decree under § 301 (a) ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a 'final decision' within the meaning of 28 U.S.C. § 1291." (Emphasis added.)

Subsequent to the decision in *Goodall,* courts of appeals in various circuits have had occasion to comment on the impact the relief sought in the district court has upon the right to appeal. Thus, in *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283,* 269 F. 2d 618 (2d Cir. 1959), the court, after referring to the distinction made in the *Goodall* case, stated (269 F. 2d at 620):

> "However, the situation in that leading case is not the situation we have in the case before us. Here the

> district judge after looking at the contract decided that it was not his responsibility to decide in the first instance whether the plaintiff employer was entitled to the relief it claimed. . . . The stay pending arbitration which the court granted was not a denial of the full relief sought; the arbitration proceeding is, in effect, 'merely a form of trial, to be adopted in the action itself, in place of the trial at common law; it is like a reference to a master, or an "advisory trial" under Federal Rules of Civil Procedure. . . .' Murray Oil Products Co. v. Mitsui & Co., 2 Cir., 1944, 146 F. 2d 381, 383. Consequently, it is the type of arbitration which was by implication differentiated in Goodall-Sanford by the Court's statement that the arbitration requested there was 'not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought.'"

The distinction was discussed also by the Court of Appeals for the Ninth Circuit in *Alexander* v. *Pacific Maritime Association,* 332 F. 2d 266 (1964) wherein the court stated (at 267):

> "It is well settled that a stay of an action pending arbitration is not a final judgment appealable under 28 U.S.C. 1291. Ross v. Twentieth Century-Fox Film Corp. (9 Cir. 1956) 236 F. 2d 632, 633; Kirschner v. West Co. (3 Cir. 1962) 300 F. 2d 133, 134; Armstrong-Norwalk Rubber Corp. v. Local Union No. 283 (2 Cir. 1959) 269 F. 2d 618, 620-621.

Applying the rationale of these decisions, it is clear that the decision of the district court in this case remanding the dispute for further arbitration before the NRAB is not an appealable order. The relief sought was not an order to arbitrate; on the contrary, it was an action to enforce an arbitration award. The court did not dismiss the action as requested in the motion of the rail-

road. Instead, the court ruled that since it could not determine whether the union was entitled to the ultimate relief sought until the NRAB rendered an arbitration award that complied with the requirements of the Railway Labor Act, it was remanding the dispute for the purpose of having the NRAB do so. This is precisely the kind of order that the above cases held would not be appealable.

Finally, in the only other case in which the issue was raised in the same context as that of the instant case, the Court of Appeals for the Eighth Circuit held that a remand order of the district court referring the dispute back to the NRAB for further consideration is not appealable under 28 U.S.C. Section 1291.

Thus, in *Transportation-Communication Employees Union* v. *St. Louis-San Francisco Ry.*, 419 F. 2d 933, cert. den. 91 S. Ct. 34 (1970), the district court had found that the NRAB award was defective and remanded the dispute to the NRAB for further consideration. An appeal was taken to the Eighth Circuit from the order of remand. The appellate court dismissed the appeal stating (at 935-936):

> "We are convinced that when the law is applied to the facts of this case, the conclusion must follow that the judgments appealed from are not final decisions. The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action.
>
> "As pointed out by TCU, the court did in its memorandum opinion determine some issues, such as a holding that the dispute was a minor dispute and that the Arbitration Board has jurisdiction to decide the controversy over the interpretation of the bargaining agreement between TCU and the railroad.

> Such rulings are interlocutory and remain subject to revisions at any time before final decision and are reviewable only upon an appeal from final judgment. Rule 54(b), Fed. R. Civ. P., *Stewart* v. *Bishop, supra,* p. 680 of 403 F. 2d; *Mesabi Iron Co.* v. *Reserve Mining Co.*, 8 Cir., 270 F. 2d, 567, 569.
>
> "TCU urges that the trial court by its remand to the Board has lost jurisdiction of the case and that review of any subsequent proceedings by the Board could be instituted in another court. Whether or not the subsequent proceedings could be instituted in another court in our view has no material bearing upon the crucial issue of whether the orders appealed from are final decisions. As heretofore pointed out, the orders appealed from do not meet the finality standards set forth in the cases previously discussed."

4. The union's final point (Petition, at 28-29) concerns the importance of the issues raised by its petition. The statistics it cites, however, do not support the union's conclusion. The union refers to statistics showing that in the three-year period following the 1966 amendments to the Railway Labor Act approximately 7000 awards and orders issued under Section 3 of the Act. Assuming the same proportions continued for the next two years, the total number of decisions now approximates 10,000. During the same period only two cases have reached the courts of appeals on the issue sought to be raised here and in both cases the courts construed the Act in the same way. It is obvious that the questions presented here do not approach the magnitude or the importance attached to them by the union.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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